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THE FEDERAL-STATE CORPORATE LAW RELATIONSHIP—A RESPONSE TO PROFESSOR SELIGMAN'S CALL FOR FEDERAL PREEMPTION OF STATE CORPORATE FIDUCIARY LAW

*William T. Quillen**

INTRODUCTION

Claiming that state law changes in recent years have emasculated both the substance and enforcement of the fiduciary duties of care and loyalty, Professor Seligman argues that "sufficient evidence has accumulated to justify possible congressional action" to impose upon public companies a new set of federal fiduciary duty standards in place of those presently existing under state law.¹ Further, Professor Seligman, in a none-too-subtle swipe at the performance of state courts, would have such newly-created federal causes of action litigated in the federal courts and he would expressly prohibit federal courts from deferring to special litigation committees in suits properly alleging misconduct of any member of a corporation's board of directors.² Professor Seligman's call for partial federal preemption of state corporate law through the introduction of federal minimum standards is by no means new. For example, in 1976, Professor Seligman, Ralph Nader and Mark Green spearheaded an unsuccessful effort to promote federal chartering for major U.S. corporations.³

This Article suggests that, contrary to Professor

* Former Chancellor, Delaware Court of Chancery; retired Justice of the Delaware Supreme Court; Secretary of State of Delaware and Distinguished Visiting Professor of Law at the Widener University School of Law. Justice Quillen expresses his appreciation to A. Gilchrist Sparks, III and William M. Lafferty of the Delaware Bar for invaluable assistance in the preparation of this response.

¹ Joel Seligman, *The New Corporate Law*, 59 BROOK. L. REV. 1, 61 (1993).

² *Id.* at 61.

³ RALPH NADER ET AL., *TAMING THE GIANT CORPORATION* (1976); see also William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

Seligman's thesis, there has been no failure in the state law development and enforcement of fiduciary duties since that time to justify the radical step he readvocates now.⁴ Indeed, the climate of our times—federal deficits, corporate downsizing, volatile profit and loss margins and global competition—makes Professor Seligman's renewed advocacy peculiarly dated.

The premise underlying Professor Seligman's proposal is that both substantively and procedurally the state law fiduciary duties of care and loyalty are no longer sufficient to protect the interests of stockholders.⁵ That premise is incorrect. As this Article will demonstrate, the examples cited by Professor Seligman as establishing a need for federal preemption in reality do no such thing. In fact, the "decline" witnessed by Professor Seligman's arguments frequently lack any real-world starting point and often reflect isolated instances that have heightened judicial scrutiny. On a more positive note, this Article posits that, since the United States Supreme Court's landmark decision in 1977 in *Santa Fe Industries, Inc. v. Green*,⁶ a healthy partnership has developed between the state and federal systems whereby federal disclosure law, enforced in the federal courts, has forced into the open both the facts with respect to corporate transactions and the extent to which the decisionmaking process might be infected by a possible conflict of interest. Thus, stockholders who are armed with specific facts are able to prosecute effectively meritorious claims for breaches of the duty of loyalty under state law in state courts. To the extent that Professor Seligman insists that transactions not involving a conflict of interest on the part of a board majority should nonetheless be subject to an entire fairness standard of judicial scrutiny⁷ or that state law should be altered to facilitate an increase in derivative litigation based solely upon alleged violations of the fiduciary duty of care,⁸ his arguments lack merit.

Part I of this Article analyzes and refutes Professor Seligman's flawed hypothesis that there has been a decline in

⁴ Seligman, *supra* note 1, at 61.

⁵ *Id.* at 36.

⁶ 430 U.S. 462 (1977).

⁷ See Seligman, *supra* note 1, at 13.

⁸ *Id.* at 60.

the state law fiduciary duty of loyalty. Part II next argues that state law enforcement of the duty of care has increased, not decreased, due in large part to the seminal case of *Smith v. Van Gorkom*.⁹ Rejecting Professor Seligman's theory, Part III argues that special litigation committees and the demand requirement have neither hindered the enforcement of the duty of loyalty nor led to a wholesale dismissal of meritorious derivative actions. Finally, Part IV concludes that state corporation law, particularly Delaware's corporation law, has substantially progressed and refined itself resulting in the continued, effective enforcement of the fiduciary duties of loyalty and care.

I. THERE HAS BEEN NO DISCERNABLE DIMINUTION IN THE STATE LAW DUTY OF LOYALTY

Professor Seligman advocates the partial federal preemption of state fiduciary law based upon a flawed hypothesis. He asserts that there has been a decline in the state law fiduciary duty of loyalty due to, among other reasons, Delaware courts applying the business judgment rule in reviewing the adoption of tender offer defenses by corporate boards, instead of the application of a duty of loyalty analysis (i.e., the entire fairness standard). But, quite to the contrary, there has been no decline in the state law fiduciary duty of loyalty under Delaware law in the arena of tender offer defenses or otherwise. Rather, the duty of loyalty rule as stated in the seminal Delaware case of *Guth v. Loft, Inc.*¹⁰ is still a guiding principle of Delaware corporate law today.¹¹

Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests.

⁹ 488 A.2d 858 (Del. 1985).

¹⁰ 5 A.2d 503 (Del. 1939). It is similarly inaccurate to suggest that state corporate law has failed in the insider trading and corporate suffrage areas. See, e.g., *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971); *Brophy v. Cities Serv. Co.*, 70 A.2d 5 (Del. Ch. 1949).

¹¹ See, e.g., *Heineman v. Datapoint Corp.*, 611 A.2d 950, 954 (Del. 1992); *Mills Acquis. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989); *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1345 (Del. 1987); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1985); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983); *Grand Metro. Pub. Ltd. v. Pillsbury Co.*, 558 A.2d 1049, 1055 (Del. Ch. 1988).

While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.¹²

Professor Seligman's characterization of the Delaware Supreme Court's decision in *Unocal Corp. v. Mesa Petroleum Co.*¹³ as a step backward in state law enforcement of the fiduciary duty of loyalty is similarly misguided.¹⁴ *Unocal*, far from being a step backward and contributing to the decline of the fiduciary duty of loyalty, was actually a step in the direction Professor Seligman advocates; that is, the application of a heightened standard of review by courts when reviewing the adoption of defensive measures by corporate boards in the face of unsolicited tender offers.

Although there were no Delaware cases directly on point, several federal courts applying Delaware law prior to *Unocal* have held that the business judgment rule applied to the decision by a board to adopt defensive measures to thwart or impede a hostile takeover.¹⁵ In *Unocal*, the Delaware Supreme Court had to decide the validity of a corporation's tender offer for its own shares, which excluded from participation a stockholder making a hostile tender offer for the corporation's stock. While the court reaffirmed that the business judgment rule is applicable in the context of a hostile takeover, it held that due

¹² *Guth*, 5 A.2d at 510.

¹³ 493 A.2d 946 (Del. 1985).

¹⁴ Seligman, *supra* note 1, at 21.

¹⁵ See, e.g., *Panter v. Marshall Field & Co.*, 646 F.2d 271, 295-97 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Johnson v. Trueblood*, 629 F.2d 287, 292-93 (3d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981). Professor Seligman, on the other hand, would have any potential loyalty factor in a takeover context treated the same way as an interested CEO's vote on his or her own executive compensation; these two situations, though, are very different. See Seligman, *supra* note 1, at 9.

to "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an *enhanced duty* which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred."¹⁶

First, the supreme court held that in order for the business judgment rule to apply, "directors must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed because of another person's stock ownership"¹⁷ and that such a showing "is materially enhanced . . . by the approval of a board comprised of a majority of outside independent directors who have acted in accordance with the foregoing standards."¹⁸ Significantly, in establishing the first prong of its enhanced duty analysis, the Delaware Supreme Court reaffirmed *Guth's* basic principal "that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders."¹⁹ In this regard, the court noted, in adopting a defensive measure to thwart or impede a takeover, "the directors may not have acted solely or primarily out of a desire to perpetuate themselves in office"²⁰ and the defensive measure implemented by the directors must be "motivated by a good-faith concern for the welfare of the corporation and its stockholders, which in all circumstances must be free of any fraud or other misconduct."²¹

As a second prerequisite to the application of the business judgment rule, the court held that directors must establish that the defensive measure is balanced—that is, "reasonable in relation to the threat posed."²² Thus, to satisfy the balance element, the directors must analyze the nature of the takeover bid and its effect on the corporate enterprises including

inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on "constituencies" other than shareholders (*i.e.*, creditors, customers, employees, and perhaps even the

¹⁶ *Unocal*, 493 A.2d at 954 (emphasis added).

¹⁷ *Id.* at 955 (citing *Cheff v. Mathes*, 199 A.2d 548, 554-55 (Del. 1964)).

¹⁸ *Id.*

¹⁹ *Id.* (citing *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939)).

²⁰ *Id.* (citing *Cheff*, 199 A.2d at 556 and *Kors v. Carey*, 158 A.2d 136, 140 (Del. Ch. 1960)).

²¹ *Id.* (citing *Cheff*, 199 A.2d at 554-55).

²² *Id.*

community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange While not a controlling factor, it also seems to us that a board may reasonably consider the basic stockholder interests at stake, including those of short term speculators, whose actions may have fueled the coercive aspect of the offer at the expense of the long term investor.²³

Thus, only if the directors adopting a defensive measure in the face of a hostile tender offer first satisfy their enhanced, two-pronged duty of showing that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed (which decision, as a practical matter, must be made by a majority of independent directors in order to be respected) and, second, that the defensive measure was reasonable in relationship to the threat posed, are they entitled to the protections of the business judgment rule. Otherwise, the directors will have the burden of showing that the defensive measure was entirely fair. *Unocal* thus imposed greater, not lesser, burdens on directors than were widely perceived to exist before.

In a further effort to support his theory that there has been a decline in the state law's protection of stockholders' interests, Professor Seligman misplaces reliance on the "other constituencies"²⁴ language in *Unocal*, arguing that a broad reading of *Unocal* would sanction director action that was taken against the interests of stockholders and that "[i]f this language were construed broadly, it would be revolutionary in its significance."²⁵ However, as Professor Seligman grudgingly concedes, "There is good reason to doubt that the Delaware Supreme Court intended so broad a meaning."²⁶

In fact, in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,²⁷ the Delaware Supreme Court specifically narrowed the "other constituencies" language in *Unocal*.²⁸ The court, while generally reaffirming the principles underlying its *Unocal* decision, struck down the lock-up option, break-up fee, and "no-shop" provisions adopted by Revlon to put an end to an ongo-

²³ *Id.* at 955-56 (footnote omitted).

²⁴ *See id.* at 955.

²⁵ Seligman, *supra* note 1, at 18.

²⁶ *Id.* at 18.

²⁷ 506 A.2d 173 (Del. 1986).

²⁸ *Id.* at 182.

ing auction.²⁹ The court held that once the target's board had determined to sell the company, "[t]he directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."³⁰

While acknowledging that lock-up options were not *per se* illegal under Delaware law, the court concluded that the Revlon board's emphasis on shoring up the sagging market value of certain outstanding notes was inconsistent with its primary responsibility to stockholders.³¹ Importantly, the court rejected Revlon's argument that, under the "other constituencies" language in *Unocal*, it could appropriately consider the interests of noteholders in determining to favor one bidder over another:

The Revlon board argued that it acted in good faith in protecting the noteholders because *Unocal* permits consideration of other corporate constituencies. Although such considerations may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, *provided there are rationally related benefits accruing to the stockholders* However, such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.³²

Thus, the Delaware Supreme Court in *Revlon* adopted *two* significant limitations³³ on the discretion of a board to consider the interests of "other constituencies" in adopting a defensive measure to thwart or impede a takeover bid: (1) when

²⁹ *Id.* at 180-87.

³⁰ As the Delaware Supreme Court noted, when it became apparent that "the break-up of the company was inevitable," the duty of Revlon's board "changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit." *Id.* at 182.

³¹ *Id.* at 182-83.

³² *Id.* at 182 (emphasis added) (citation omitted). The court then affirmed the lower court injunction against the lock-up option and break-up fee, stating that "when a board ends an intense bidding contest on an insubstantial basis, and where a significant by-product of that action is to protect the directors against a perceived threat of personal liability," the action cannot withstand the heightened scrutiny under *Unocal*. *Id.* at 184.

³³ Professor Seligman, by contrast, believes that *Revlon* adopted only one limitation on a board's discretion to consider "other" constituencies. See Seligman, *supra* note 1, at 20.

an auction among active bidders is in progress and the goal is no longer to protect or maintain the corporate enterprise but to sell it to the highest bidder, a board cannot consider the "other constituencies" noted in *Unocal*, but instead must focus solely upon the maximization of shareholder value; and (2) in other circumstances, a board may consider "other constituencies" in fulfilling its responsibilities, "provided there are rationally related benefits accruing to the stockholders."³⁴ These limitations make it clear that the consideration of "other constituencies" will not "unhinge directors" of Delaware corporations from their duty of loyalty to shareholders as Professor Seligman suggests.³⁵

It is also significant that Delaware has resisted any temptation to adopt legislation diluting the fiduciary duty of loyalty owed by directors to stockholders, refusing to follow the lead of at least twenty-five other states that have enacted "other constituency" statutes.³⁶ Such statutes explicitly permit—and in at least one case require—the board of any corporation chartered in the state to consider, in discharging its duties, the interests of groups other than stockholders.³⁷ Under *Revlon*, however, directors in Delaware may only consider "other constituencies" if there "are rationally related benefits accruing to the stockholders."³⁸ Professor Seligman simply fails to acknowledge that Delaware's approach actually enhances the duty of loyalty owed by directors to stockholders instead of detracting from it: it allows for consideration of "other constituencies" only if there will be benefits accruing to the company's stockholders from doing so.

To support further his claim that state law has ceased to

³⁴ *Id.* at 182.

³⁵ Seligman, *supra* note 1, at 20.

³⁶ As at least one author has noted:

Perhaps the most surprising fact in the emergence of these statutes in so many states in only a few years is the almost total lack of any considered deliberation concerning this legislation. Typically, these statutes have been hustled through the state legislatures by business and bar groups determined to add as many weapons as possible to the anti-takeover arsenal.

James J. Hanks, Jr., *Non-Stockholder Constituency Statutes: An Idea Whose Time Should Never Have Come*, 3:12 INSIGHTS at 20 (Dec. 1989).

³⁷ See, e.g., CONN. GEN. STAT. ANN. § 33-313(e) (West 1992).

³⁸ *Revlon*, 506 A.2d at 182.

function to protect stockholders from breaches of the duty of loyalty, Professor Seligman makes passing reference to two cases in which a fiduciary duty breach was not established, *Ivanhoe Partners v. Newmont Mining Corp.*³⁹ and *Paramount Communications, Inc. v. Time, Inc.*⁴⁰ He ignores, however, those cases decided *after Revlon* in which the Delaware courts have taken swift action to remedy breaches of the duty of loyalty and to assure that stockholder interests are adequately protected.⁴¹ In *Ivanhoe Partners* the Delaware Supreme Court held that the obligation under *Revlon* to maximize short-term values did not arise because the sale of Newmont was not "inevitable," even though Newmont had facilitated the purchase by Gold Fields—a twenty-six percent stockholder—of additional shares such that Gold Fields eventually became a 49.7% stockholder.⁴² A critical fact in the court's holding, which Professor Seligman's analysis ignores, is that Newmont's Board had negotiated a standstill agreement with Gold Fields requiring that control of the Board remain with the public stockholders.⁴³ Similarly, in attacking the Delaware Supreme Court's decision in *Paramount*, Professor Seligman makes no reference to the massive factual record before the court establishing that the business judgment to combine Time and Warner had been based on years of careful study and had been made before any takeover pressure had been brought to bear upon either board.⁴⁴

In yet another effort to establish his "race-to-the-bottom" thesis, Professor Seligman expresses displeasure with "pre-planned defensive mechanisms" such as the poison pill" and questions how such measures "could be more difficult to justify when the terms of a potential tender offer were unknown."⁴⁵ In *Moran v. Household International, Inc.*,⁴⁶ the Delaware

³⁹ 535 A.2d 1334 (Del. 1987).

⁴⁰ 571 A.2d 1140 (Del. 1989).

⁴¹ See, e.g., *In re Holly Farms Corp. Shareholders Litig.*, 564 A.2d 342 (Del. Ch. 1989); *Mills Acquis. Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989); *Tate & Lyle Pub. v. Staley Continental, Inc.*, No. 9813, 1988 WL 46064 (Del. Ch. May 9, 1988).

⁴² *Ivanhoe Partners*, 535 A.2d at 1345.

⁴³ *Id.* at 1343.

⁴⁴ *Id.* at 1153-54.

⁴⁵ Seligman, *supra* note 1, at 22.

⁴⁶ 500 A.2d 1346 (Del. 1985).

Supreme Court validated the adoption of a poison pill mechanism to ward off possible future advances. After finding the *Unocal* analysis to be applicable, the court held that Household's directors were protected by the business judgment rule in adopting the poison pill since the decision to adopt it was informed, undertaken in good faith and reasonable in relation to the general threat posed.⁴⁷ However, in a holding completely responsive to Professor Seligman's rhetorical question, the court emphasized that when and if Household's Board had been faced with a request by a potential acquiror to redeem the poison pill, it would have been required to determine whether or not the rights should be redeemed. That determination would have been subjected to the *Unocal* standard.⁴⁸

Since *Moran*, Delaware cases involving poison pills have focused on situations where a board was faced with deciding whether or not to redeem its company's poison pill in the face of a pending hostile tender offer.⁴⁹ While a number of Delaware cases have validated board decisions to keep their respective company's poison pills in place, Delaware courts have also ordered that they must be redeemed when there is no longer any valid corporate purpose served by maintaining them.⁵⁰ Moreover, Delaware courts have also ordered that rights be redeemed under *Unocal* when keeping them in place is no longer reasonable in relation to any threat posed by the hostile bid.⁵¹ Courts have also recognized that poison pills have been

⁴⁷ *Id.* at 1357.

⁴⁸ *Id.* at 1354.

⁴⁹ See, e.g., *BNS Inc. v. Koppers, Inc.*, 683 F. Supp. 458 (D. Del. 1988); *In re Holly Farms Corp. Shareholders Litig.*, No. 10350, 1988 WL 143010 (Del. Ch. Dec. 30, 1988); *MAI Basic Four, Inc. v. Prime Computer, Inc.*, C.A. No. 10428, 1988 WL 140221 (Del. Ch. Dec. 20, 1988); *Doskocil Cos., Inc. v. Griggy*, No. 10095, 1988 WL 105751 (Del. Ch. Oct. 7, 1988); *Nomad Acquis. Corp. v. Damon Corp.*, Nos. 10173, 10189, 1988 WL 96192 (Del. Ch. Sept. 30, 1988); *Tate & Lyle, Pub. v. Staley Continental, Inc.*, No. 9813, 1988 WL 46064 (Del. Ch. May 9, 1988); *Facet Enter., Inc. v. Prospect Group, Inc.*, No. 9746, 1988 WL 36140 (Del. Ch. Apr. 10, 1988).

⁵⁰ See, e.g., *Mills Acquis. Co. v. Macmillan, Inc.*, No. 10168, 1988 WL 108332 (Del. Ch. Oct. 18, 1988), *rev'd on other grounds*, 559 A.2d 1261 (Del. 1988).

⁵¹ See, e.g., *Grand Metro. Pub. v. Pillsbury Co.*, 558 A.2d 1049 (Del. Ch. 1988) (ordering Pillsbury to redeem its rights plan because the court found the continuation of the rights plan to be a "Draconian" response to Grand Met's all-cash, all-shares bid); *City Capital Assoc. Ltd. Partnership v. Interco, Inc.*, 551 A.2d 787 (Del. Ch. 1988) (holding that a board was not justified in refusing to redeem rights at the end of an auction where the final bids resulting from the auction

effective in securing higher acquisition prices for stockholders.⁵² Thus, Professor Seligman's misgivings about pre-planned defensive measures are misguided, since they also must be scrutinized under the enhanced *Unocal* standard and in light of their pragmatic results.

As the cases referred to above demonstrate, there has been no decline in the enforcement of the duty of loyalty—at least under Delaware law, particularly in the area of tender offer defenses. To the contrary, the heightened standard established in *Unocal* has led to increased, not decreased, scrutiny of tender offer defenses. Moreover, it is clear that under Delaware law the interests of “other constituencies” in the context of adopting a defensive measure may be considered only if “there are rationally related benefits accruing to the stockholders.”⁵³ Thus, even in the maelstrom posed by the fierce debate in the 1980s over whether tender offers were good or bad, the Delaware courts adapted and were able to develop rational approaches to the continued enforcement of the fiduciary duty of loyalty first espoused in *Guth*.

II. STATE LAW ENFORCEMENT OF THE DUTY OF CARE HAS INCREASED, NOT DECREASED

It is truly astonishing that Professor Seligman, whose article attacks Delaware law in advocating his tired “race-to-the-bottom” thesis, pays so little attention to what is likely the most celebrated duty of care case in history—*Smith v. Van Gorkom*.⁵⁴ Prior to that decision the common wisdom was that, as a practical matter, directors of non-financial institutions were immune from personal liability for duty of care violations. Far from leading to a decline in the duty of care, as Professor Seligman argues,⁵⁵ the *Van Gorkom* decision and its aftermath led to heightened awareness and enforcement of the

were so close that one bid could not reasonably be said to be superior to the other).

⁵² See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 181 (Del. 1985). *City Capital*, 551 A.2d at 797-98; see also *CRTF v. Federated Dep't Stores, Inc.*, 683 F. Supp. 422 (S.D.N.Y. 1988).

⁵³ *Revlon*, 506 A.2d at 182.

⁵⁴ 488 A.2d 858 (Del. 1985).

⁵⁵ Seligman, *supra* note 1, at 57.

duty of care, and undoubtedly has raised the level of performance of corporate directors.

In 1985 the Delaware Supreme Court in *Van Gorkom* imposed liability upon the directors of Trans Union for conduct that to many seemed wholly undeserving of the characterization "gross negligence." In a 3-2 decision, the court reversed the Chancellor and found gross negligence in the directors' process of evaluating and approving the sale of their corporation at a premium to an unrelated third party.⁵⁶ The court found that the sale was effected with insufficient exploration of either the underlying factual framework or the available alternatives. Specifically, the court held that the plaintiff had successfully demonstrated that the directors' decision was uninformed, thereby rebutting the presumption that their business judgment was an informed one.⁵⁷ Thus, the directors of Trans Union, in a decision supported by only three of the six judges who considered the case, were denied the protection of the business judgment rule and were held personally liable for any damages resulting from their actions, even though there were no allegations of self-dealing.⁵⁸

Not surprisingly, the *Van Gorkom* decision sent shock waves through the corporate world and provoked much harsh criticism.⁵⁹ Nevertheless, far from detracting from the duty of care, *Van Gorkom* focused national attention on it. Moreover, *Van Gorkom* had the effect of raising the level of conduct in corporate boardrooms across the country; it made directors aware that a significant failure to become aware of material facts before making a decision that subsequently resulted in damage or loss to the corporation or its shareholders created a significant risk that a court would impose personal liability when conducting a *post hoc* review of the director's decision.

Van Gorkom also had the negative effect of discouraging qualified outsiders from serving on corporate boards as inde-

⁵⁶ *Van Gorkom*, 488 A.2d at 858.

⁵⁷ *Id.* at 874.

⁵⁸ *Id.* at 889, 893.

⁵⁹ See, e.g., Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437 (1985); William T. Quillen, *Trans Union, Business Judgment and Neutral Principles*, 10 DEL. J. CORP. L. 465 (1985); Arthur M. Borden, *First Thoughts on Decision in Delaware on Trans Union*, N.Y. L.J., Feb. 25, 1985, at 1.

pendent directors because the risk of personal liability for a breach of the duty of care was not worth the reward of serving on a corporate board.⁶⁰ Moreover, this negative effect was exacerbated by problems in the market for directors' and officers' liability insurance, which appeared at about the same time.⁶¹ These concerns led to the enactment of section 102(b)(7) of the Delaware General Corporation Law,⁶² which permits shareholders of a Delaware corporation to amend their corporation's certificate of incorporation prospectively to eliminate or limit the personal liability of directors for money damages arising from a breach of the duty of care.⁶³ However, by the express language of the statute, a section 102(b)(7) charter provision cannot relieve directors of personal liability for:

(1) any breach of the duty of loyalty; (2) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (3) any liability for declaration of unlawful dividends or unlawful stock repurchases or redemptions; or (4) any transaction from which a director received an improper personal benefit.⁶⁴

While suggesting that the advent of section 102(b)(7) and similar statutes has caused a decline in the enforcement of the duty of care,⁶⁵ Professor Seligman provides no support for this theory. Moreover, in advocating his position, he fails to point out that such a charter provision can only be enacted by a shareholder vote (except for new corporations), and he fails to mention that section 102(b)(7) does not place challenged conduct beyond the scope of judicial review. In fact, section 102(b)(7) charter provisions pose no legal impediment to efforts to obtain injunctive or other equitable relief (not involving money damages) that may be sought to enforce the duty of care. Absolutely contrary to Professor Seligman's argument, section 102(b)(7) correctly emphasizes enforcement of the duty of care at the injunction stage rather than at the damages stage of litigation. Moreover, far from leading to a decline in

⁶⁰ D. DREXLER ET AL., DELAWARE CORPORATION LAW AND PRACTICE § 15.06[1], at 15-30 (1993).

⁶¹ *Id.*

⁶² DEL. CODE ANN. tit. 8, § 102(b)(7) (1991).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Seligman, *supra* note 1, at 50.

the enforcement of the duty of care, *Van Gorkom* and its aftermath sent a strong signal that Delaware courts will closely scrutinize allegations of directorial rubber-stamping of management recommendations. Similarly, after *Van Gorkom* the failure of directors to insist upon adequate information and to undertake an independent analysis of matters brought to their boards will be viewed seriously by Delaware courts.

Finally, Professor Seligman's implicit call for more stockholder derivative litigation seeking money damages to enforce the duty of care is misguided,⁶⁶ particularly given the problems that corporations already face in finding qualified outside directors who are willing to serve. The social utility of increasing stockholder derivative suits against directors and their insurers simply to enforce the duty of care is a dubious proposition in and of itself, given the cost of such litigation and the likelihood that it will simply be passed on indirectly to stockholders and consumers in the form of higher insurance premiums. Moreover, society's need to resort to the duty of care derivative suit as a tool to monitor management would appear to be much less today than in 1976 when Professor Seligman first argued for federal incorporation.⁶⁷ the increased strength of large institutional stockholders and increased stockholder activism in recent years makes it more likely that inept management will be forced out either at the ballot box or as the result of indirect pressure from stockholders. In short, the proper focus for enforcing the duty of care should be at the injunction stage of litigation—usually the preliminary injunction stage—and at the ballot box. So viewed, the combination of *Van Gorkum* and section 102(b)(7) is another example of the state law naturally maturing to maximize fiduciary standards while minimizing monitoring costs.

III. THE EVOLVING SPECIAL COMMITTEE AND DEMAND PROCEDURES UNDER STATE LAW ALSO DO NOT JUSTIFY THE RADICAL SOLUTION PROPOSED

Professor Seligman further hypothesizes that another explanation for the purported decline in state law fiduciary

⁶⁶ See, Seligman, *supra* note 1, at 60.

⁶⁷ See NADER ET AL., *supra* note 3.

duty concepts during the past thirty years is the evolution of certain procedures for the termination of stockholder derivative actions, including the use of special litigation committees and, more specifically, the demand requirement.⁶⁸ Once again, both Professor Seligman's theory and analysis are unsupported by the facts and the law.

A. *Special Litigation Committees*

As Professor Seligman recognizes, in *Zapata Corp. v. Maldonado*⁶⁹ the Delaware Supreme Court adopted a middle ground for reviewing the recommendations of a special litigation committee. *Zapata* created a new procedural and substantive framework for cases in which a special litigation committee seeks to take control of or dismiss derivative litigation on the grounds that the action is non-meritorious or that, even if possibly meritorious, continued prosecution would be detrimental to the best interests of the corporation.⁷⁰ However, far from making it easy for directors to dismiss derivative litigation based upon the recommendation of a special litigation committee, the hurdles that must be cleared under the two-step approach set forth in *Zapata* are prodigious.

First, in reviewing the recommendation of a special litigation committee to dismiss a derivative action, the trial court, must "inquire into the independence and good faith of the committee and the bases supporting its conclusions."⁷¹ Limited discovery may be ordered by the trial court to facilitate such inquiries and the corporation bears the burden of establishing

⁶⁸ See Seligman, *supra* note 1, at 23-25.

⁶⁹ 430 A.2d 779 (Del. 1981).

⁷⁰ As Professor Seligman notes, prior to *Zapata*, courts confronting motions to dismiss based upon recommendations of special litigation committees had reacted differently. Several courts outside of Delaware had interpreted Delaware law as permitting dismissal whenever the court was satisfied that a committee was in fact wholly independent and financially disinterested, and that the committee had made a reasonable investigation. See, e.g., *Abbey v. Control Data Corp.*, 603 F.2d 724 (8th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980); *Maldonado v. Flynn*, 485 F. Supp. 274 (S.D.N.Y. 1980), *rev'd on other grounds*, 671 F.2d 729 (2d Cir. 1982); *Siegal v. Merrick*, 84 F.R.D. 106 (S.D.N.Y. 1979); *Gall v. Exxon Corp.*, 418 F. Supp. 508 (S.D.N.Y. 1976); *Auerbach v. Bennett*, 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979).

⁷¹ *Zapata*, 430 A.2d at 788.

independence, good faith and reasonable investigation.⁷² If the trial court finds that: (1) the corporation has not carried its burden of establishing the committee's independence and good faith; (2) that it has not shown reasonable bases for its conclusions; or (3) "if the Court is not satisfied for other reasons relating to the process, including but not limited to the good faith of the committee, the Court shall deny the corporation's motion."⁷³

Only if the trial court is satisfied that the corporation has carried its burdens under Chancery Court Rule 56 (which is identical to Federal Rule of Civil Procedure 56) standards may it then proceed "*in its discretion*, to the next step."⁷⁴ If the court does proceed to the second step, it must apply "its own independent business judgment" in determining whether the motion to dismiss should be granted, and *not* defer to the business judgment of the special litigation committee.⁷⁵ As the *Zapata* court noted, "[t]his means, of course, that instances could arise where a committee can establish its independence and sound bases for its good faith decisions and still have the corporation's motion denied."⁷⁶ This second step was "intended to thwart instances where corporate actions meet the criteria of step one, but the result does not appear to satisfy its spirit, or where corporate actions would simply prematurely terminate a stockholder grievance deserving of further consideration in the corporation's interest."⁷⁷

With the benefit of hindsight, it is apparent that one factor not appreciated by the *Zapata* decision is that the objective of a special litigation committee's recommendation to dismiss a derivative action is, in most cases, to save expenses by cutting short frivolous litigation. *Kaplan v. Wyatt*,⁷⁸ the first reported decision in which the *Zapata* procedures were utilized, highlighted this point. In *Kaplan*, Chancellor Brown described in detail the intracorporate and judicial proceedings mandated under *Zapata* and expressed his view that the *Zapata* proce-

⁷² *Id.*

⁷³ *Id.* at 789.

⁷⁴ *Id.* (emphasis added).

⁷⁵ *Id.* (emphasis added).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 484 A.2d 501 (Del. Ch. 1984), *aff'd*, 499 A.2d 1184 (Del. 1985).

dures were "fraught with practical complications at the trial court level" that would neither lead to the speedy resolution of derivative actions nor reduce the expense of such litigation.⁷⁹

Shortly after Chancellor Brown's opinion in *Kaplan*, *Zapata's* special litigation committee procedure was again tested in *Lewis v. Fuqua*.⁸⁰ In *Fuqua*, the plaintiff alleged that a majority of Fuqua's directors had diverted a corporate opportunity to themselves by purchasing common stock of a company which Fuqua was acquiring through purchase of that company's preferred stock.⁸¹ The Fuqua board appointed Terry Sanford, the President of Duke University (and also the former governor of North Carolina), as the sole member of a special litigation committee, to be assisted by outside counsel.⁸² After what the court expressly found to be adequate investigation, the one-man special litigation committee recommended that the derivative action not be pursued.⁸³

The court of chancery, however, refused to dismiss the action, based on three independent grounds. First, the court found that the corporation had not carried its burden of establishing that the special litigation committee was independent. It noted that the committee member, who had been on the board at the time of the alleged wrongdoing, had been named as a defendant and that he had numerous political and financial dealings with Fuqua's chief executive.⁸⁴ Next, the court found that the committee's legal analysis of plaintiff's claims did not have a reasonable basis.⁸⁵ Finally, the court applied its own independent business judgment and determined that the action should not be dismissed.⁸⁶

Since the decision in *Fuqua*, there do not appear to be any reported dismissals of stockholder derivative actions under

⁷⁹ *Kaplan*, 484 A.2d at 509-10.

⁸⁰ 502 A.2d 962 (Del. Ch. 1985), *appeal denied*, 504 A.2d 571 (Del. 1986). Curiously, Professor Seligman relegates this case to treatment in a footnote. See Seligman, *supra* note 1 at 34 n.140.

⁸¹ *Fuqua*, 502 A.2d at 964.

⁸² *Id.* at 965.

⁸³ *Id.* at 967.

⁸⁴ *Id.* at 966-67. The financial dealings were not with Governor Sanford personally. Instead, what concerned the court was that J. B. Fuqua had made a major contribution to Duke University when Sanford was President. *Id.*

⁸⁵ *Id.* at 967.

⁸⁶ *Id.* at 971-72.

Zapata's special litigation committee procedures, nor do there appear to be any pending cases involving the review of a special litigation committee's recommendation to dismiss a stockholder derivative action. Further, members of the practicing bar advise that, since *Fuqua*, few if any corporations have availed themselves of the *Zapata* procedure.⁸⁷ It is not surprising that *Zapata's* special litigation committee procedure has fallen into disuse since *Fuqua*, given the very real prospect that a corporation might appoint a special litigation committee, prepare a thorough report at great time and expense and have that report serve as the blueprint for plaintiff's continued prosecution of the litigation, rather than as the basis for its dismissal. This discarded procedure can hardly qualify as a "fundamental explanation for the decline of the state corporate law duty of loyalty."⁸⁸

Thus, in light of the significant burdens placed upon a corporation relying on the recommendation of a special litigation committee to dismiss derivative litigation under *Zapata*, and the fact that the special litigation committee procedures have not been widely used, Professor Seligman's hypothesis that the special litigation committee procedures have somehow hindered the enforcement of the duty of loyalty in any material way is unfounded.

B. *The Demand Requirement*

In the same breath, Professor Seligman then attacks the substantive demand requirement⁸⁹ without acknowledging

⁸⁷ Moreover, in light of the decision in *Fuqua*, it is apparent that the Court of Chancery will take an active role in reviewing recommendations of special litigation committees to dismiss derivative litigation, and that given the broad discretion vested in the Court of Chancery by the Supreme Court in *Zapata*, it is unlikely that a decision rejecting a special litigation committee recommendation will be reversed on appeal.

⁸⁸ Seligman, *supra* note 1, at 23.

⁸⁹ The "demand requirement" refers to the legal requirement that prior to instituting a derivative action, a stockholder must first make a demand on the board of directors that it bring suit on behalf of the corporation unless the making of such a demand is excused as futile. This substantive requirement is embodied in Chancery Court Rule 23.1, which requires a derivative plaintiff to allege with particularity the efforts, if any, that he made to obtain such action from the directors and why those efforts failed or, alternatively, why no such efforts were made. DEL. CH. CT. R. 23.1.

that the demand issues involve a completely separate line of cases. Professor Seligman's theory that the demand requirement and the case law that has developed thereunder have somehow led to a material decline in the enforcement of the duty of loyalty is wholly unsupported.

For a number of years the demand requirement languished, but with a series of cases beginning with the 1984 decision in *Aronson v. Lewis*,⁹⁰ the Delaware Supreme Court breathed new life into it. In *Aronson* the complaint named all of the directors as defendants and challenged as wasteful an allegedly excessive employment agreement granted to a forty-nine percent stockholder.⁹¹ Reversing the court of chancery's finding of demand futility, the Delaware Supreme Court rejected the plaintiff's allegations as insufficient under Chancery Court Rule 23.1⁹² and enunciated a two-part test for determining demand futility. In order for a complaint to withstand a Rule 23.1 motion to dismiss for failure to make demand, a complaint must allege with particularity, facts creating a reasonable doubt that "(1) the directors are disinterested and independent, and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."⁹³ The court analyzed the first prong in terms of interested director transactions and held that if a derivative complaint set forth facts that, if true, would show that a majority of the directors had personally profited from a challenged transaction or was dominated by someone who had, demand would be futile.⁹⁴ With respect to the second prong, the court held that "the mere threat of personal liability for approving a questioned transaction, standing alone," is insufficient to disqualify a board from considering a demand. For one tempted to overread the practical import of this decision, it is significant to note that the plaintiff in *Aronson* merely amended the complaint and marched onward with the case.

*Levine v. Smith*⁹⁵ may have marked a high watermark for the defense in the demand line of cases. The Delaware Su-

⁹⁰ 473 A.2d 805 (Del. 1984).

⁹¹ *Id.* at 808.

⁹² See *supra* note 90.

⁹³ *Aronson*, 473 A.2d at 814.

⁹⁴ *Id.* at 815.

⁹⁵ 591 A.2d 194 (Del. 1991).

preme Court, in affirming the dismissal of the plaintiffs' second amended complaint found, among other things, that plaintiffs had failed to meet their burden of pleading particularized facts sufficient to support a claim of demand futility based on a lack of independence of General Motors' outside directors, or sufficient to rebut the presumption that General Motor's buyback of stock from Ross Perot was the product of a valid exercise of business judgment.⁹⁶ The court in *Levine* restated that it would apply an abuse-of-discretion standard of review in such demand futility cases and held that the Court of Chancery's findings were supported by the record and, thus, did not constitute an abuse of discretion.⁹⁷

A strict reading of the foregoing cases might suggest that it has become difficult, if not impossible, to allege successfully demand futility. On the contrary, however, since the 1991 decision in *Levine*, there have been a number of decisions where Delaware's Court of Chancery has excused stockholders from making a demand.⁹⁸ For example, in *Abajian v. Kennedy*,⁹⁹ Chancellor William T. Allen, while emphasizing the highly discretionary nature of the "reasonable doubt" determination set forth in *Aronson* and its progeny, denied defendants' motion to dismiss for failure to make demand, concluding that the facts alleged in the amended complaint were "sufficient to create a reasonable doubt concerning the availability of the business judgment rule protections."¹⁰⁰ Similarly, in *In re Chrysler Corp. Shareholders Litigation*,¹⁰¹ Vice Chancellor Jack B. Jacobs found that the entrenchment claims in the complaint contained particularized facts sufficient to allege that the directors were motivated solely or primarily by entrenchment concerns, thereby creating a reasonable doubt that

⁹⁶ *Id.* at 208.

⁹⁷ *Id.* at 207.

⁹⁸ See, e.g., *In re Chrysler Corp. Shareholders Litig.*, No. 11873, 1992 WL 181024 (Del. Ch. July 27, 1992); *Boeing Co. v. Shrontz*, No. 11273, 1992 WL 81228 (Del. Ch. Apr. 20, 1992); *Chrysogelos v. London*, No. 11910, 1992 WL 58516 (Del. Ch. Mar. 25, 1992); *Andreae v. Andreae*, No. 11905, 1992 WL 43924 (Del. Ch. Mar. 5, 1992); *Abajian v. Kennedy*, No. 11425, 1992 WL 8794 (Del. Ch. Jan. 17, 1992); *Kells-Murphy v. McNiff*, No. 11009, 1991 WL 137143 (Del. Ch. July 12, 1991); *Thorpe v. Cerbco, Inc.*, 611 A.2d 5 (Del. Ch. 1991).

⁹⁹ No. 11425, 1992 WL 8794 (Del. Ch. Jan. 17, 1992).

¹⁰⁰ *Abajian*, No. 11425, 1992 WL 8794, at *1.

¹⁰¹ No. 11873, 1992 WL 181024 (Del. Ch. July 27, 1992).

they were disinterested when they adopted the amendments that lowered the trigger on the corporation's rights plan.¹⁰²

Continuing the spate of recent cases excusing demand, the most recent pronouncement from the Delaware Supreme Court is *Heineman v. Datapoint Corp.*¹⁰³ In *Heineman*, the court reversed as an abuse of discretion the decision of the court of chancery, which dismissed the plaintiff's amended complaint for failure to allege with particularity facts sufficient to excuse demand. While reaffirming the principles in *Aronson* and *Levine* with respect to the pertinent legal standards, the court emphasized that the court of chancery's decision under those principles "involves essentially a discretionary ruling on a predominantly factual issue."¹⁰⁴ Thus, in reviewing the court of chancery's decision, the supreme court separately analyzed all four of the transactions challenged in the complaint under the abuse of discretion standard. It rebuked the lower court for giving "conclusory treatment" to the claims in the complaint and for not analyzing them separately.¹⁰⁵ The court went on to find that, with respect to two of the transactions at issue, the plaintiff had alleged "sufficient facts of apparent self-dealing to raise a reasonable doubt concerning director disinterest."¹⁰⁶ With respect to two other transactions at issue, the court gave the benefit of the doubt to the plaintiff and refused to affirm the dismissal of the claims even though the court conceded that it was "at least arguable" that the factual allegations underlying the claims were inadequate.¹⁰⁷ Instead, the court gave the plaintiff leave to amend his complaint with respect to those claims.¹⁰⁸

Contrary to Professor Seligman's hypothesis, these recent Delaware cases suggest that the demand requirement has not undermined the enforcement of the duty of loyalty and has not led to a wholesale dismissal of meritorious derivative actions. Instead, with thoughtful application, the demand requirement appears to be evolving into a sensitive device for sorting out

¹⁰² *Id.* at *45.

¹⁰³ 611 A.2d 950 (Del. 1992).

¹⁰⁴ *Id.* at 952 (quoting *Grobow v. Perot*, 539 A.2d 180, 186 (Del. 1988)).

¹⁰⁵ *Id.* at 953.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 955.

¹⁰⁸ *Id.* at 956.

frivolous claims at an early stage in litigation.¹⁰⁹ To cut off such developments in the law by preempting them with federal statutes would seem short-sighted at best.

CONCLUSION

Far from stultifying or backsliding since the last serious call for federal preemption, state corporation law—and particularly Delaware's corporate law—has progressed and refined itself in ways that have resulted in the continued enforcement of the fiduciary duties of loyalty and care to protect the interests of stockholders. State corporate law also continues to allow boards of directors appropriate discretion in managing the affairs of corporations.¹¹⁰ As set forth above, the developments under Delaware law in the area of corporate takeovers, particularly the enhanced scrutiny of defensive measures under the *Unocal* standard, have led to an increased enforcement of the duty of loyalty and not a decline as suggested by Professor Seligman. The procedural obstacles that Professor Seligman views as impeding the protection of stockholders' interests have had little or no practical effect on preventing

¹⁰⁹ The statement by Professor Seligman that "as much as 71 percent of a recent random sample of settlements of shareholder claims have apparently been litigated under the federal securities laws, not state corporate law" provides no empirical support for his unfounded conclusion that state corporate law enforcement has declined. Seligman, *supra* note 1, at 36. Professor Seligman's hypothesis is legally flawed because it incorrectly assumes that stockholders have a choice of whether to bring substantive state law fiduciary duty breach claims or federal securities law disclosure claims. See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977). Further, Professor Seligman's hypothesis is flawed because it fails to recognize that there are likely to be other reasons for the purported decline in corporate cases brought under state law, most notably the recent and dramatic decline in takeovers and the marked increase in initial public offerings.

¹¹⁰ For example, in the 1980s, at the height of the takeover frenzy, many states adopted statutes that were intended to thwart tender offers and openly advertised such laws in order to attract corporations. In 1987, after extensive public hearings, Delaware became the 37th state to adopt an anti-takeover statute when the Delaware General Assembly adopted a business combination statute that has been described by one commentator as the most even-handed of the genre. LEWIS S. BLACK, JR., *WHY CORPORATIONS CHOOSE DELAWARE* (1993). Far from serving as a "show stopper," the Delaware business combination statute provides incentives for the fair economic treatment of stockholders. DEL. CODE ANN. tit. 8, § 203 (1991). Given the high level of takeover activity that followed its enactment, it clearly did not serve as a barrier to fairly-priced, non-coercive takeovers. Such a balanced approach is typical of the studied development of Delaware statutory and case law.

meritorious derivative actions from proceeding. Likewise, the *Van Gorkom* decision has led to heightened awareness of, and adherence to, the substantive duty of care.

While Professor Seligman refers to federal law becoming the "new" corporate law, his thesis in advocating federal regulation of state corporate law is anything but "new." There is even less reason now than in the 1970s, when Professor Seligman last called for federal preemption, for federal intervention in an area traditionally governed exclusively by principles of state law. The reasons for rejecting federal preemption in the area of state corporate law should be evident. First, the increased administrative costs associated with federal preemption would be exorbitant, particularly at a time when the federal government is attempting to down-size in many areas in order to reduce the federal budget deficit. Second, federal preemption would inflict significant cost increases and case-load burdens on an already over-burdened federal court system. Moreover, federal preemption would severely detract from the flexible nature of state corporation law and its ability to adapt to new trends and to provide quick resolution of complex corporate law issues. For example, it is hard to imagine that the diverse and overburdened federal court system could have matched the performance of the Delaware courts in developing, in only five short years, the comprehensive common law emanating from the *Unocal* and *Revlon* lines of cases applicable to directors' duties in responding to takeovers.

The so-called "race-to-the-bottom" theory upon which Professor Seligman bases his call for federal preemption is nonexistent because state law, and particularly Delaware law, must as a practical matter search for a middle ground. If Delaware were to ignore the interests of stockholders, the State would incur the risk of federal preemption advocated in Professor Seligman's article. On the other hand, a law that was perceived as anti-management could well result in management decisions to reincorporate elsewhere. Steering a course to avoid both risks, Delaware has taken a solid middle ground and, as a result, remains the premier state of incorporation in the United States; this is due to the flexible, yet well-defined, Delaware General Corporation Law statute, numerous precedent-setting cases, a flexible and well-trained Division of Corporations, and the world-renowned court of chancery. Finally, Delaware con-

tinues to set high standards for the enforcement of the fiduciary duties of loyalty and care in order to protect the interests of stockholders of Delaware corporations.